Public Prosecutor v Abd Latif bin Sakimin

HIGH COURT (JOHOR BAHRU) — CRIMINAL TRIAL NO 45–8 OF 2002
AZAHAR MOHAMED JC
5 APRIL 2005

Criminal Law — Trafficking in dangerous drugs — Whether knowledge of drugs proved — Dangerous Drugs Act 1952 s 39B(1)(a)

Evidence — Witness — Failure of prosecution to call witness — Whether caused miscarriage of justice and fatal to prosecution case — Whether non-production of witness should be dealt with only at end of trial after accused presented his defence

The accused was charged for the offence of trafficking in dangerous drugs, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The prosecution claimed that at the time the accused was arrested, the drugs were found in a package ('exh P7A') tucked at the waist of the accused while the accused's version was that the drugs were found in a black plastic bag held in his right hand. The defence was that the accused was an innocent carrier and that he was deceived by one Rahim to carry the drugs. Learned counsel for the accused argued that by reason of the non-production of several witnesses, namely both Islam Mahmood and two Myanmar women, the accused person's right to mount an effective defence had been prejudiced.

Held, sentencing the accused to death:

(1) To establish possession for the purpose of s 37(da) of the Act, the court must consider two separate questions. Firstly, whether the accused was in possession of the drugs and secondly, whether the accused had knowledge of the nature of the things possessed. From the evidence adduced, the accused was in actual possession the drugs. Knowledge is a matter of fact, which in the nature of things cannot be proved by direct evidence. It can only be proved by inferences from the surrounding circumstances. In this case, the brown paper package (exh P7A) was found tucked at the waist of the accused and covered with the t-shirt he was wearing which was tucked out. Moreover, when PW4 introduced himself as police officer, the accused shivered. All these cumulative factors established that the accused actually knew the nature of the thing that was found in the brown paper package (exh P7A) tucked at his waist. Accordingly, the prosecution had made up a prima facie case of actual possession against the accused and in view of s 37(da) of the Act the accused shall be presumed, until the contrary is proved, to be trafficking in the said dangerous drugs (see para 10).

(2) The point raised by the learned counsel that the non-production of both Islam Mahmood and the two Myanmar women had caused a miscarriage

of justice should be appropriately dealt with at the end of the trial after the accused presented his defence (see para 11). The court found after having considered the evidence of the defence, that the non-production of these witnesses had not succeeded in creating a reasonable doubt that the accused was not in possession of the dangerous drugs at the material time and place as stated in the charge (see para 15).

(3) The public officers who testified as prosecution witnesses were credible witnesses and having watched their demeanor in the witness box, the manner in which they had testified and after anxiously scrutinising their answers in examination-in-chief, cross-examination as well in re-examination, the court was satisified that they were telling the truth. The court was therefore satisfied beyond any reasonable doubt that the drugs were found in exh P7A tucked at the waist of the accused. And that further the court held that the black plastic bag did not exist and it was simply a creation of the accused (see para 13).

[**Bahasa Malaysia summary**

Tertuduh telah didakwa atas kesalahan mengedar dadah berbahaya, satu kesalahan di bawah s 39(B)(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut'). Pihak pendakwa mengatakan bahawa semasa tertuduh ditangkap, dadah telaah dijumpai dalam satu bungkusan ('eks P7A') yang disorok pada pinggang tertuduh sementara versi tertuduh pula adalah dadah tersebut dijumpai didalam beg plastik hitam yang dipegang di tangan kanannya. Pembelaan adalah bahawa tertuduh adalah pembawa tidak bersalah dan bahawa beliau telah ditipu oleh seseorang yang bernama Rahim supaya membawa beg tersebut. Peguamcara yang arif tertuduh menghujahkan bahawa atas sebab beberapa saksi tidak ditampilkan, iaitu kedua-dua Islam Mahmood dan dua orang wanita Myanmar, hak tertuduh untuk mengutarakan pembelaan yang efektif telah diprejudiskan.

Diputuskan, menjatuhkan hukuman mati ke atas tertuduh:

(1) Untuk membuktikan milikan bagi tujuan s 37(da) Akta tersebut, mahkamah perlu mempertimbangkan dua soalan yang berasingan. Pertama, sama ada tertuduh memiliki dadah tersebut, dan kedua, sama ada tertuduh mempunyai pengetahuan berkenaan dengan sifat benda yang dimilikinya. Daripada bukti yang ditampilkan, tertuduh didapati sebenarnya memiliki dadah tersebut. Pengetahuan adalah merupakan satu fakta, di mana secara semula jadinya tidak boleh dibuktikan dengan keterangan langsung. Ia hanya dapat dibuktikan melalui keadaan persekitarannya. Dalam kes ini, bungkusan kertas berwarna coklat (eks P7A) dijumpai tersembunyi pada pinggang tertuduh dan ditutupi dengan baju-t yang dipakainya. Malahan pula, apabila PW4 memperkenalkan dirinya sebagai seorang pegawai polis, tertuduh menggigil. Kesemua faktor-faktor terkumpul ini membuktikan bahawa tertuduh sebenarnya mengetahui sifat sebenar

barang yang dijumpai dalam bungkusan kertas berwarna coklat tersebut (eks P7A) yang disembunyikan pada pinggangnya. Berikutan daripada itu, pihak pendakwa telah mewujudkan satu kes prima facie berkenaan dengan milikan sebenar terhadap tertuduh dan mengikut s 37(da) Akta tersebut tertuduh adalah dianggap, sehinggalah yang sebaliknya dibuktikan, mengedar dadah berbahaya tersebut (lihat perenggan 10).

(2) Perkara yang dibangkitkan oleh peguamcara yang arif bahawa ketidaktampilan kedua-dua Islam Mahmood dan dua orang wanita Myanmar telah menyebabkan salah laksana keadilan sepatutnya ditangani dengan sebaiknya pada akhir perbicaraan setelah selesainya pihak tertuduh membentangkan pembelaan (lihat perenggan 11). Mahkamah telah mendapati, setelah mempertimbangkan bukti pembelaan, bahawa ketidaktampilan saksi-saksi berkenaan telah tidak menyebabkan terhasilnya keraguan munasabah bahawa tertuduh tidak memiliki dadah berbahaya tersebut pada masa dan tempat yang material seperti yang dinyatakan dalam tuduhan (lihat perenggan 15).

(3) Pegawai-pegawai awam yang memberi keterangan sebagai saksi pihak pendakwa adalah merupakan saksi-saksi yang boleh dipercayai dan setelah menyaksikan tingkah laku mereka dalam kandang saksi, cara mereka memberi keterangan dan setelah meneliti dengan bersungguh-sungguh jawapan mereka semasa pemeriksaan utama, pemeriksaan balas dan juga pemeriksaan semula, mahkamah telah berpuas hati bahawa mereka telah memberitahu perkara yang sebenarnya. Oleh itu, mahkamah telah berpuas hati melampaui keraguan munasabah bahawa dadah tersebut dijumpai di eks P7A yang tersembunyi pada pinggang tertuduh. Seterusnya mahkamah memutuskan bahawa beg plastik hitam itu tidak wujud dan hanyalah merupakan ciptaan tertuduh (lihat perenggan 13).]

Notes

For cases on whether knowledge of drugs proved, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 121–123.

For cases on failure of prosecution to call witness, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2450–2457.

Cases referred to

Chan Pean Leon v PP [1956] MLJ 237 (refd)
Leow Nghee Lim v R [1956] MLJ 28 (refd)
PP v Abdul Rashid bin Ismail [2001] 1 AMR 1149 (refd)
PP v Looi Kow Chai [2003] 2 MLJ 65 (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(da)(iii), 39A(1), 39B(1)(a), 39B(2)

Teh Poh Teik (Teh Poh Teik & Co) for the accused.

Ahmad Akram (Deputy Public Prosecutor) (Attorney General's Chambers) for the Public Prosecutor.

Azahar Mohamed JC:

[1] The accused, Abd Latif bin Sakimin stands charged with an offence of trafficking in 36.44g of monoacetylmorphines on 14 Mac 2001 at about 4pm at No 16, Jalan Lembing 2, Taman Puteri Wangsa, Ulu Tiram, Johor Bahru, Johor, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 39B(2) of the Act thereof. The charge reads as follows:

> Bahawa kamu pada 14 Mac 2001, jam lebih kurang 4.00 petang, di No 16, Jalan Lembing 2, Taman Puteri Wangsa, Ulu Tiram, dalam daerah Johor Bahru, dalam negeri Johor Darul Ta'zim, telah didapati mengedar dadah berbahaya iaitu 36.44 gram monoacetylmorphines dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] The salient facts adduced by the prosecution are as follows. On 14 Mac 2001 at about 3pm Chief Inspector Charun Aan, (PW4), acting on information received, led a police party comprising of 7 members to raid house No 16, Jalan Lembing 2, Taman Puteri Wangsa, Johor Bahru, Johor. PW4 was a police officer attached to the Operation Division, Narcotic Department, Police Headquarters Contingent, Johor. Upon arrival, PW4 saw that the gate of the outer part of the house was not locked, PW4 and 5 members of his raiding team entered into the compound. He noticed that the main entrance wooden door and the grille were locked. Upon knocking at the door, the main door and the grille were opened by a male Myanmar, later identified as Islam Mahmood. PW4 and his team conducted a search in the house and from the bedroom of Islam Mahmood upstairs, PW4 recovered three transparent plastic packets containing substance suspected to be heroin. The plastic packets were then seized and Islam Mahmood was arrested and brought to the living room downstairs. At all material time present in the said house with Islam Mahmood was a boy about 3 or 4 years of age. At the living room downstairs PW4 then directed Islam Mahmood to telephone his relatives to come to collect the said child. About half and hour later, two Myanmar women came with two other children. Whilst PW4 was in the process of handling the boy to both the Myanmar women then suddenly a male Malay, later identified as the accused, came into the house through the same door, which the police raiding team came in before. At that point of time, PW4 and members of his team together with Islam Mahmood, the two Myanmar women and the three children were in the living room. PW4 then detained the accused by holding his left hand. When PW4 introduced himself as a police officer, the accused shivered. PW4 then brought the accused to the place marked 'X' in the sketch plan (exh P10) where a body search was conducted.

From the search, PW4 found a brown paper package (exh P7A) tucked at the waist of the accused. From inside exh P7A, PW4 found a transparent plastic packet (exh P7B), which contained yellowish granular and powdering substance, suspected to be heroin. PW4 then brought all the items recovered from the bedroom of Islam Mahmood and the accused to the police station. PW4 said that in respect of the 3 plastic packets seized from the bedroom of Islam Mahmood, he kept them in his shirt pocket whilst the exhibits seized from the accused he held them. Both the accused and Islam Mahmood were also brought to the police station for further investigation. At the police station PW4 lodged a report, prepared a search list and marked the exhibits including the three plastic packets seized from the bedroom of Islam Mahmood. The markings he made were his signatures and the date of the arrest, 14 Mac 2001. The accused together with Islam Mahmood and all the exhibits were then handed over to Inspector Chew Chee Lee, the investigating officer (PW7). Another member of the raiding team police whose testimony in substance corroborated the evidence of PW4 was Detective Corporal 100503 Mohd Yasin Yusoff (PW5). According to PW7 upon receiving the exhibits from PW4 he also separately marked the exhibits as follows. In respect of exh P7A he marked as 'C' and in respect of exh P7B he marked as 'H'. Both the exhibits also carried PW7's signature and the date of the alleged offence. PW7 was informed by PW4 that Islam Mahmood was present at the time of the accused's arrest. Islam Mahmood was charged in the Magistrate's court in respect of an offence under s 39A(1) of the Act and had been duly sentenced. PW7 did not know the whereabouts of Islam Mahmood. Several attempts were made but PW7 failed to locate Islam Mahmood. PW7 checked with the detention center at Pekan Nenas by way of telephone and was informed that there was no record in connection with Islam Mahmood. He also requested the local newspapers to locate Islam Mahmood but to no avail. Both Islam Mahmood and the two Myanmar women cannot now be located. Apparently, no statements were recorded from anyone of them.

[3] Puan Hajah Shadiah bte Mahmood, the chemist (PW6), testified that during the analysis of the drugs she had first homogenized the substance for 10 minutes which according to her was sufficient to make the substance blended well and thorough. PW6 conducted various qualitative tests to determine the type of drugs contained in the substance. From the tests she concluded that the substance contained monoacetylmorphines, dangerous drugs listed in the first schedule in the Act. PW6 proceeded with the quantitative tests to determine the percentage of monoacetylmorphines in the whole substance and she found that it contained 36.44 g of monoacetylmorphines.

[4] In his submission at the close of the case for the prosecution, learned counsel for the accused contended that the prosecution had failed to make out a prima facie case for the following reasons. The first was in relation to the non-production of both Islam Mahmood and the two Myanmar women.

In this regard, it was argued that the accused's right to mount an effective defence had been prejudiced. The second was that there were infirmities in the testimony of PW6, the chemist. Lastly, it was argued that knowledge of the accused of the drugs had not been proven.

[5] As I have said at the outset, the charge against the accused is that he did traffic in 36.44 g of monoacetylmorphine. From the submission of the learned deputy it was clear that the accused was charged with drug trafficking on the ground that he was in possession of monoacetylmorphine, which exceeded 15g in weight. Thus, it was argued by the learned deputy the accused must be deemed to be trafficking in the said drugs under the provisions of s37(da)(iii) of the Act.

[6] I should perhaps at this stage refer to the guideline on the exercise to be undertaken at the close of the prosecution case as laid down by His Lordship Gopal Sri Ram JCA in *PP v Looi Kow Chai* [2003] 2 MLJ 65 which is in the following terms:

> It therefore follows that there is only one exercise that a judge sitting alone under s 180 of the Code has to undertake at the close of the prosecution case. He must subject the prosecution evidence to a maximum evaluation and ask himself the question: If I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no prima facie case has been made out and the accused would be entitled to an acquittal.

[7] With regard to the identity and the weight of the offending substance, PW6 had testified that she had thoroughly homogenised the substance. The chemist explained how she had homogenised the substance. She conducted qualitative tests to determine the type of drugs contained in the substance. From the tests, she concluded that the substance contained monoacetylmorphines, dangerous drugs listed in the first schedule of the Act. With regard to the weight of the monoacetylmorphines, PW6 proceeded with the quantitative tests to determine the percentage of monoacetylmorphines present in the substance and she found out that it contained 36.44g of monoacetylmorphines. In my view, the evidence adduced by the prosecution had sufficiently established that for the purpose of analysis, a sufficient sample was taken of the substance in question in order to establish that the drugs were monoacetylmorphines weighing 36.44g. PW6 had been a chemist with the Chemistry Department for many years. She possessed a BSc degree majoring in chemistry and had given expert evidence in court in numerous occasions. Her expert evidence had been accepted in other drugs cases. I accepted her findings with regard to the identification and method of analysis of the drugs. I was satisfied that the analysis was properly conducted by PW6 and cannot be faulted. There was no evidence from other expert to challenge or contradict PW6's findings. I therefore accepted her findings as true and accurate.

[8] For the presumption of drug trafficking to come into play under the provisions of s 37(da) of the Act, the accused must be found in possession of the drugs. Possession under the provision must be proved by convincing, credible and admissible evidence and cannot arise out of legal presumption. What constitutes possession? I think a passage in the judgment of Thompson J (as he then was) in the case of *Chan Pean Leon v Public Prosecutor* [1956] MLJ 237 is particularly useful. This is what his lordship said at p 237:

> To establish possession for the purposes of criminal law, two separate questions are involved. The first is whether the accused party was in possession of the article in question and the second, by reason of the application of the maxim *actus non facit reum nisi mens sit rea*, is whether he had knowledge of the thing possessed.

[9] In *Leow Nghee Lim v R* [1956] MLJ 28 Taylor J said at p 30:

> Probably the most helpful definition of possession is; 'the relation of a person to a thing over which he may at his pleasure exercise such control as the character of the things admits, to the exclusion of other persons'. This definition does not express, but it does imply that the meaning of the word includes some element of knowledge.

[10] Possession therefore encompasses the element of physical control as well as an element of knowledge. Thus, knowledge constitutes an essential ingredient of possession under s 37(da) of the Act. Possession incorporates the element of knowledge and without knowledge there can never be possession under the Act. Knowledge is a matter of fact, which in the nature of things cannot be proved by direct evidence. It can only be proved by inferences from the surrounding circumstances. Turning to the facts of the case before me, there was the evidence of PW4 who conducted a body search on the accused. From the search, PW4 found a brown paper package (exh P7A) tucked at the waist of the accused in front of accused's trouser. The brown paper package contained exh P7B, a transparent plastic packet containing yellowish granular and powdering substance suspected to be heroin. In this regard, the evidence of PW5 corroborated the testimony of PW4. In the absence of any contradictions and in the absence of any inherent improbability I had accepted their evidence as credible. To establish possession for the purpose of s 37(da) of the Act, I had considered two separate questions. Firstly, whether the accused was in possession of the drugs and secondly, whether the accused had knowledge of the nature of the things possessed. From the evidence adduced, I was satisfied that the accused was in actual possession of exh P7A, which contained the yellowish granular and powdering substance. Knowledge is a matter of fact, which in the nature of things cannot be proved by direct evidence. It can only be proved by inferences from the surrounding circumstances. In this case, the brown paper package was found tucked at the waist of the accused and covered with the t-shirt he was wearing which was tucked out. Moreover, when PW4 introduced himself as police officer, the accused shivered. To my mind, all these cumulative factors established that the accused actually knew the nature of the thing that was found in the brown paper package (exh P7A) tucked at

his waist. Accordingly, I had ruled that the prosecution had made up a prima facie case of actual possession against the accused and in view of s 37 (da) of the Act the accused shall be presumed, until the contrary is proved, to be trafficking in the said dangerous drugs.

[11] As I have said earlier, learned counsel for the accused had argued that by reason of the non-production of both Islam Mahmood and the two Myanmar women, the accused person's right to mount an effective defence had been prejudiced. It was argued that there had been a miscarriage of justice and under the circumstances the accused could not have a fair trial. To support his argument, learned counsel referred to the decision of *PP v Abdul Rashid bin Ismail* [2001] 1 AMR 1149 where Zainun Ali J, *inter-alia*, held that the defence had been prejudiced through the non-availability of cross-examination of a witness and/or to have sight into witness's statement and that in the absence of the witness or her statement, the version given by the accused at best would have to be accepted as true, or at worst or in the alternative, to have raised a reasonable doubt. It is important to note that the learned judge in that case considered the issue of prejudice through the non-availability of witnesses at the end of the defence case after the accused gave his evidence. Similarly in my view the point raised by the learned counsel on the question of miscarriage of justice should be appropriately dealt with at the end of the trial after the accused presented his defence. Furthermore, the version of the defence at that stage was a version, which was put to and denied by the prosecution witnesses. At that stage the accused not having given evidence, his version could not be tested by cross-examination. The version cannot be treated as evidence as such, at that stage. At the conclusion of the whole trial and after the accused put forward his defence the court shall consider this issue again.

[12] I was therefore satisfied that at the close of the case for the prosecution, a *prima facie* case had been made up by the prosecution and accordingly, the accused was called upon to enter his defence. The three alternatives were explained to the accused. He elected to give evidence on oath. I shall now summarise his evidence as follows. The accused testified that on 14 Mac 2001 he was arrested by PW4 and his men at house No 16, Jalan Lembing 2, Taman Puteri Wangsa. At the material date the accused stayed at No 5, Kg Laut Skudai, Johor Bahru and that he worked as Pembantu Am Rendah, Majlis Perbandaran Johor Bahru Tengah. On 14 Mac 2001 between 2 and 2.30pm whilst he was in the house, his friend Rahim also known as Along came, driving a Proton No JET 268. The accused said he had known Rahim for about 10 years as he also originated from the same kampong. According to the accused, Rahim was a salesman, selling cars and 'ubat-ubat' Rahim also assisted his wife who sold 'bahan-bahan kering seperti rempah, ikan kering dan barang-barang lain untuk masakan'. Rahim then invited the accused for drinks at a stall at Taman Jaya, about 400 meters from his house. The accused then accompanied Rahim and had coffee with him. After half an hour Rahim

A invited him to Bandar Baru Uda as Rahim wanted to meet a friend. They both went in Rahim's car. On the way, Rahim received a phone call on his hand phone from his friend. He heard Rahim saying that he was busy and would ask his friend to send. Upon arrival at Bandar Baru Uda, Rahim parked his car at a restaurant near a mosque and Rahim then wrote down on a piece of paper B the address of the house, No 16, Jalan Lembing 2, Taman Puteri Wangsa and asked the accused to help deliver a package to the address which Rahim told him was in the boot of the car. Rahim told him that the contents of the package were 'bahan masakan' and according to the accused he never suspected anything incriminating. Rahim then asked him to deliver it to a male Myanmar. The C accused then took over the wheels and proceeded to the said address. The accused took about one hour to reach the said house having proceeded along the Pasir Gudang highway and took some time to locate the house. Upon arrival he parked the car in front of the house. He then opened the boot of the car. The accused testified that he saw a black plastic bag which was placed D in a box measuring about 1 ft x 6 inches. The said black plastic bag was folded and the contents of the said bag could not be seen. The accused then took the black plastic bag with his right hand. At the time when the accused took the said plastic bag, he had a glance at the contents of the said bag and he saw a folded yellow paper package. The accused could not see what was inside the E paper package. It was the story of the accused that he then held the plastic bag in his right hand and approached the said house. The accused further testified that he then went into the compound; the grille to the door of the house was not locked. The wooden door was slightly ajar. The accused knocked at the wooden door two times and gave 'salam'. The wooden door was pushed open further as a result of the act of knocking by the accused. From where he F stood, the accused could see that in the living room were two females, three males, three children and one male Myanmar. The three males were later identified by the accused as PW4 and members of the raiding team. The accused then took one step into the house. Then PW4 said to the accused 'mari sini' with his hand movements asking the accused to approach him. The G accused then approached him. According to the accused, PW4 then seized the black plastic bag from his right hand. PW4 then took out the contents of the black plastic bag, which was witnessed by the accused, and PW4 then informed him that it contained dangerous drugs. The accused then became frightened and shivered. The accused responded by saying that he did not H know of the drugs. The accused said he told PW4 that the drugs belonged to Rahim who had asked him to deliver to the male Myanmar. PW4 then asked his men to do a body search on him and the accused was then handcuffed. According to the accused at that point of time he saw PW4 took out two plastic packets from his shirt pocket and put them into the black plastic bag. The I accused further testified that the black plastic bag was never produced in court. The accused said that it was not true that the brown paper package (exh P7A) and its contents were tucked at his waist and that he wore a T-shirt to hide it.

The accused also said that it was not true that PW4 held his hand as soon as he stepped into the house. The accused denied that PW4 seized exh P7A from his waist. The accused said that if he had known it was drugs he would not have delivered it for Rahim. Prior to this the accused said that he had helped Rahim to send 'ubat ginseng' and 'bahan makanan kering'. DW2, Haironi bin Ahmad, the brother-in-law of the accused testified as to the existence of Rahim and according to him Rahim was also known as Along. DW2 said he knew Rahim also for about 10 years and he had seen Rahim in the accused's house. DW2 also confirmed that Rahim sold cars and 'ubat' and would help his wife in selling 'bahan dapur'. DW2 also testified that he had accompanied Rahim to Kuala Lumpur in connection with a meeting in regard to direct selling.

[13] Now, the accused had presented a differing version of how the drugs were recovered from him. It was the case for the prosecution that the drugs were actually found in exh P7A tucked at his waist. On the other hand it was the accused's version that the drugs were found in a black plastic beg held in the accused's right hand. I had already dealt with the credibility of PW4 and PW5 at the close of the case for the prosecution. The credibility of these witnesses requires reassessment in the light of the differing versions. To my mind, such a serious allegation by the accused as to the manner and the circumstances in which the drugs were actually recovered from him tantamount to a grave accusation of fabrication by the police to frame-up the accused. However, there is no evidence at all to point to a reason or motive why PW4 and PW5 would want to fabricate the evidence to frame-up the accused. PW4 denied to a suggestion by learned counsel for the accused that he wanted to strengthen the case for the prosecution against the accused. There is no reason why these witnesses should conspire to fabricate evidence against the accused to get the accused convicted, particularly in a case at hand, which involves capital punishment. PW4 and PW5 had both unmistakably testified that the accused was not holding anything when he entered the house. According to these witnesses only after a search was made by PW4 on the accused's body, exhibit P7A was found tucked at his waist. Although it had been put to these witnesses in cross-examination by learned counsel for the accused, they firmly denied that the drugs were recovered in a black plastic bag taken from the accused's right hand. Both these witnesses had withstood a vigorous cross-examination by a very experienced and competent counsel though I keep in mind that the fact they were unshaken in cross-examination is not an all-sufficient acid test of credibility. In my judgment, their version of the sequences of events was consistent with the rest of the evidence adduced by the prosecution. To my mind these public officers merely testified based on what they actually saw on that particular day. They could certainly have improved on their evidence if they wanted to frame-up the accused. It is my finding that they are credible witnesses and are telling the truth after also watching their demeanor in the witness box, the manner in which they had testified and after anxiously scrutinising their answers in examination-in-chief, cross-examination

as well in re-examination. I am therefore satisfied beyond any reasonable doubt that the drugs were found in exh P7A tucked at the waist of the accused. And that further in my judgment the black plastic bag did not exist and it was simply a creation of the accused.

[14] It is appropriate now I deal with a central aspect of the defence of the accused. It is the question of the existence or otherwise of 'Rahim' or 'Along'. In this regard when PW4 was being cross-examined on Rahim it was put to him that the accused did tell him that Rahim asked him to deliver the incriminating items and that the accused did give to him the name of Rahim or Along. PW4 did not deny the suggestions put by the defence but instead his response was 'tidak ingat'. DW2, Haruni bin Ahmad testified as to the existence of Rahim who was also known as Along. According to DW2 he knew Rahim for about 10 years and he had seen Rahim in the accused's house. After considering all the available evidence, I am inclined to accept the existence of Rahim as confirmed by the testimony of DW2. This brings into focus the accused's defence that Rahim requested him to deliver a package to a house at No 16, Jalan Lembing 2, Taman Puteri Wangsa, Ulu Tiram, Johor Bahru, Johor. It was the accused's evidence that Rahim told him that the content of the package was 'bahan masakan'. According to the accused, he never suspected anything incriminating. In other words, the accused's defence was that he was an innocent carrier and that he was deceived by Rahim to carry the drugs. The accused pointed the blame to Rahim. I have carefully and anxiously consider this important aspect of the accused's defence. The first thing that I want to say is that although in the context of our society it is courteous to carry things on behalf of one's friend, I must say that in the circumstances of this particular case, I find it somewhat strange that at the time when Rahim stopped the car at Bandar Baru Uda near the mosque, Rahim only said the plastic bag was in a box in the boot of his car. Rahim did not bother to take out the plastic bag and hand it over to the accused. Neither one of them open the boot to confirm the existence of the plastic bag. IfRahim could spare a moment writing on a piece of paper the address the accused were to deliver the bag, surely Rahim could spare a few seconds to show the accused the plastic bag in the boot which was to be sent to the address. The accused did not take the trouble to look at it. It seems he merely relied on Rahim's assurance. In the light of the above, this conduct seems to indicate that the accused knew exactly the true nature of the things he was supposed to send on behalf of Rahim. However, the most telling and critical evidence, which shows that the accused knew precisely the content of the brown paper package, is the fact that he tucked it at his waist and covered it with the t-shirt he was wearing. As I have said earlier, I accepted as the truth the evidence of PW4 and PW5 that the drugs were found in exh P7A tucked at the accused's waist. I rejected as a concoction the story of the accused about the existence of the black plastic bag and that he was holding it in his right hand when the police confronted him though I appreciated the fact that

this story was put to PW4 and PW5. To my mind the story was an after-thought meant to project the impression that the accused did not carry any incriminating items. If in fact he was carrying 'bahan masakan' why must he tuck at his waist and cover it with his t-shirt. This indicates his concern about the thing he was carrying. The most sensible and logical action for the accused to do was to carry the 'bahan masakan' in his hand and not to hide it. Hefeared what was tucked at his waist but he was willing to accept the risk. The proper and only irresistible inference to be drawn from the facts and circumstances must be that that the accused knew he was carrying dangerous drugs on behalf of Rahim. The accused tucked exh P7A at his waist for the reason that he did not want it to be seen and also because of his guilty conscience. In the end, I am wholly convinced that at the material time and place the accused knew he was carrying drugs and that he was not an innocent carrier. In my judgment the totality of the evidence, the surrounding circumstances and the conduct of the accused when taken together irresistibly point to the accused having knowledge of the offending exhibits at the material time.

[15] Finally, I must now deal with the submission of learned counsel that the accused was prejudiced, as he could not call Islam Mahmood and the two Myanmar women to be his witnesses, as the prosecution did not produce them. The significant point that should be noted here is that the non-production of these witnesses by the prosecution is on account of the failure to subpoena them and it is not as a result of withholding or suppression of evidence. I do not detect any oblique motive on the part of the prosecution in not producing these witnesses. As I have said earlier, I accepted the evidence of PW4 and PW5 with regard to the manner and circumstances the drugs were recovered from the accused and that the evidence of the accused in this respect is an after-thought and a concocted story to shore up his defence. In the result, Iam unable to accept with the submission of learned counsel that the accused was prejudiced as a result of non-production of these witnesses. I should perhaps point out that the case of *Pendakwa Raya v A Rashid bin Ismail* relied on by the learned counsel is distinguishable on its facts. There, according to the case for the prosecution the accused was seen running away and throwing two plastic bags containing cannabis. In his testimony the accused admitted throwing the plastic bags as alleged by the prosecution but the accused claimed that he did so under the impression that the packages contained pornographic literature. In the case at hand it is my finding that the accused concocted a story that he was holding the black plastic bag in his hand. At this juncture, I would like to lay emphasis that the non-production of these witnesses has not succeeded in creating a reasonable doubt that the accused was not in possession of the dangerous drugs at the material time and place as stated in the charge.

[16] Having considered the evidence in its entirety, it is my judgment that the accused has failed on a balance of probabilities to rebut the presumption

of trafficking under s 37(da) of the Act. Neither has he raised any reasonable doubt as to the truth of the prosecution case. I therefore find that the prosecution has proved its case against the accused beyond all reasonable doubt on the charge. Accordingly I find the accused guilty as charged. I impose the only sentence allowed by law, that is to say, I hand out the mandatory sentence of death. I further direct that the accused be hanged till he is dead.

Accused sentenced to death.

Reported by Loo Lai Mee